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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 32

M. G. McNAIR, AS RECEIVER OF THE FIRST NATIONAL BANK OF PERRY, ETC.,

Petitioner,

vs.

W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

CARY D. LANDIS,
Attorney General of Florida;
H. E. CARTER,
J. COMPTON FRENCH,
Assistant Attorneys General;
T. J. SWANSON,
Counsel for Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS.

I.

The Attempted Distinction of the Lewis Case Is Based Upon a Fallacious Premise.

The first proposition in petitioner's reply brief is an attempt to distinguish the case of *Lewis, Receiver,* v. *Fidelity and Deposit Company of Maryland,* 292 U. S. 559, from the instant case. The argument is based upon a fallacious premise and must fall. In speaking of the *Lewis* case counsel states: " • • • we may assume, for purposes of discussion, that it was not beyond the power of the bank to give a bond, nor in fact to give a surety bond." We cannot assume any such thing. An examination of the *Lewis*

case shows that when, under the Georgia statute, a surety bond was given, a lien was created upon all the assets of the bank for the performance of the conditions of that bond. The statute was in existence at the time the bond was given, and of course became part of the bond contract just as though the words of the statute were actually written into it. *Counsel reasons that it was perfectly legal for* the bank to give the bond because the bank could not be held to its promise contained therein creating a general lien upon all of its assets. In other words, that the bond was a mere scrap of paper and therefore could be legally given.

As authority for their assumption counsel cite the case of *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, but we call attention to the fact that in that case this Court, in speaking of the giving of a surety bond to secure *private* deposits, said:

> "Such a practice would likewise be a departure from the policy of equal treatment of depositors;". (Text, page 256.)

It seems clear that when the bank in the *Lewis* case gave a surety bond in 1928, it committed an *ultra vires* act.

Counsel contends the assets of the bank were dissipated, but we find nothing in the record justifying that statement. The assets pledged were not given away, or wasted. They were merely pledged to secure repayment of balances in the hands of the bank, which balances were never repaid.

II.

The Trial Court's Opinion Is Correct.

Counsel's second proposition is also without merit. It is contended that the trial court should have required an answer to be filed by the defendants showing a new contract to give security or implying such a new contract. The

bill of complaint was filed in December, 1935, long after the Act of June 25, 1930. It was not necessary for the defendants to plead the statute and of course the trial court took judicial notice of it and held that the *original* intention of the parties to give security, for balances on hand at any time, could be given effect to as to those bal*ances remaining on hand after June 25, 1930.*

The Court's opinion states in substance that the bill of complaint showed no deposits after June 25, 1930, and showed no call on the bank for a repledge of the securities. The statement is true and it certainly was not error for the Court to make the statement. Moreover the Court's statement has not been assigned as error.

III.

Action Originally Ultra Vires Remains So In Pottorff Case.

Counsel's third proposition is a mere reiteration of the argument found at page 18 of petitioner's original (white) brief. We feel that it is sufficient to merely call the Court's attention to the fact that the case of *Texas and Pacific Railway Company* v. *Pottorff, supra,* involved the giving of security for *private* funds, which the paramount Federal law prohibited both before and after the Act of June 25, 1930.

Respectfully submitted,

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J. COMPTON FRENCH,
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T. J. SWANSON,
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(2252)

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1937.

M. G. McNair, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws, Petitioner,
vs.
W. V. Knott, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 13, 1937.]

Mr. Justice Black delivered the opinion of the Court.

The question presented is whether the National Bank Enabling Amendment of June 25, 1930, which granted power to National Banks to secure deposits of public funds, validates or makes enforceable previous pledge agreements made to protect such funds deposited before the Enabling Amendment became effective.

That Enabling Act[1] provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Before, and at the time this Enabling Amendment was passed, the laws of Florida authorized state banks to give security for public deposits and also imposed upon public officials a duty to obtain such security.[2] In 1929 and 1930, before the passage of this amendment, the First National Bank of Perry, Florida, by agreement with the officials of Taylor County, Florida, pledged collateral security for the protection of county funds thereafter to be deposited from time to time in the bank.

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[1] Ch. 604, 46 Stat. 809, 12 U. S. C., 90.

[2] First American Bank & Trust Co. *v.* Palm Beach, 96 Fla. 247, 117 So. 900, 65 A. L. R. 1398; Davis *v.* Knott, 109 Fla. 60, 147 So. 276.

This contractual relationship, established by the pledge agreement and deposits made thereunder, continued to exist until the bank was closed October 18, 1930. The Receiver for the closed bank at first recognized the pledge agreement as valid and enforceable and accordingly paid the county the income he received from the pledged securities. In 1935, however, the receiver filed this suit in equity in the Federal District Court for the Northern District of Florida, alleging that the pledge agreement was *ultra vires* and illegal and praying that it be cancelled and annulled. Upon motion of the county, the district court dismissed the bill. 13 Fed. Sup. 963. The Circuit Court of Appeals for the Fifth Circuit affirmed. 87 F. (2d) 817. This Court granted certiorari. 301 U. S. —, 57 S. Ct. 930, 87 L. Ed. —.

The issues raised require that we determine:

(1) Did Congress intend to validate existing *ultra vires* pledges?

(2) Could this pledge agreement be validated by changing the law which was in force when the transaction was initiated?

First. The language of the amendment, read in the light of the conditions that brought about the necessity for its passage, leads irresistibly to the conclusion that Congress did intend to make existing pledges enforceable.

The amendment does not expressly exclude existing contracts from its field of operation. On the contrary it extended a general grant of the broad power to give security for public deposits, with a single limitation relating to the kind of security given by state banks. If Congress had desired to limit the remedial grant to subsequent security contracts, it would doubtless have provided an additional limitation relating to prior agreements. This it did not do. Congress alone had the power to write such a limitation in the bill.[3]

Agreements to secure public deposits did not violate any express statutory prohibition; no statute imposed a penalty for making such agreements. Since the banking act of 1863 Congress has passed many laws requiring that security be given to protect deposits of certain public funds.[4]

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[3] Louisville & Nashville Railroad Co. *v.* Mottley, 219 U. S. 467, 479; James *v.* Milwaukee, 16 Wall. 159, 161.

[4] Texas and Pacific Railway Co. *v.* Pottorff, 291 U. S. 257, note 11.

For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits.[5]

The Senate Committee on Banking and Currency which made a favorable report on the Enabling Amendment gave information to the Senate in its report that millions of dollars worth of collateral had been pledged by National banks as security for public deposits.[6] The Senate and House Committee reports show that the sponsors of the amendment desired it not merely to permit future pledges but also to assure that agreements under which "millions of dollars" of pledges had been made by National banks would be enforceable. One of the chief reasons for the enactment of the amendment was the need for validation of pledges already made. The amendment was designed to meet this need. To determine that Congress did not intend to validate pledge agreements existing when the amendment was passed would greatly limit its curative effect. Such a construction would be an unwarranted departure from the plain intent of this curative and enabling statute.

Second. Appellant insists that the contract could not be validated by changing the law which was in force when the pledge agreement was made.

There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as "remedial", "curative", or "enabling", merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts.[7] Placing the stamp of

[5] See cases collected in 42 Harvard Law Rev. 272; 79 University of Pennsylvania Law Rev. 608.

[6] Senate Report No. 67, 71st Cong., 2d Sess.

[7] Watson *v.* Mercer, 8 Pet. 88 (defective acknowledgment in deed validated by general law); Galveston Railroad *v.* Cowdrey, 11 Wall. 459 (mortgage validated by general statute); Randall *v.* Kreiger, 23 Wall. 137 (defective

legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made.[8]

This Court held that the Enabling Amendment removed the obstacle that prevented the enforcement of a contract of a National bank to give security to the State of Georgia for its deposits.[9] In that case as in this case, the bank made an *ultra vires* agreement to secure public deposits. In that case the deposits were made after the law was passed and were legal. In this case the deposits were made before the law was passed and were legal. In that case as in this case, the only illegal element of the agreement was the attempt to give security for public deposits. In that case as in this case, the parties permitted the original illegal security agreement to remain unaltered in its terms after the amendment was enacted. In that case it was held that the security agreement—originally *ultra vires*—became enforceable from the date the amendment became effective. In this case, we hold that the security agreement—originally *ultra vires*—became enforceable from the date the amendment became effective. Let the judgment of the Circuit Court of Appeals be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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power of attorney validated by general statute); Ewell *v.* Daggs, 108 U. S. 143 (note validated by general statute); Gross *v.* U. S. Mortgage Co., 108 U. S. 477 (mortgage validated by general statute); Utter *v.* Franklin, 172 U. S. 416 (bonds validated by general law); West Side Belt Railroad Co. *v.* Pittsburgh Cons. Co., 219 U. S. 92 (contract validated by general statute); Brown *v.* Boston & Maine Railroad Co., 233 Mass. 502 (agreement to purchase stock validated).

[8] Ewell *v.* Daggs, *supra.*

[9] Lewis *v.* Fidelity & Deposit Co. of Maryland, 292 U. S. 559.

SUPREME COURT OF THE UNITED STATES.

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vs.

W. V. Knott, as Treasurer of the State of Florida, W. V. Knott, Treasurer of the State of Florida, as ex-officio County Treasurer of Taylor County, Florida, et al.

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 13, 1937.]

Mr. Justice McReynolds, concurring.

The challenged judgment, I think, should be affirmed upon the theory that subsequent to the enabling amendment of June 25, 1930, both parties recognized an existing obligation to observe the terms of the pledge agreement, and on this understanding maintained the relationship of debtor and creditor. Discussion of other questions seems unnecessary.

Prior to June 25, 1930, the Perry National Bank obtained deposits of public funds by undertaking to hypothecate certain of its assets to secure their payment. This went beyond the corporate power theretofore conferred. *Texas & Pacific Railway Company* v. *Pottorff*, 291 U. S. 245; *Marion, etc. v. Sneeden*, 291 U. S. 262; *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559.

The amendment empowered the bank to secure such deposits by a pledge of assets. For more than three months thereafter the securities originally hypothecated were allowed to remain in the keeping of the trustee without suggestion of change in the outstanding agreement. And during that period prior deposits were allowed to remain with the bank. It closed October 18, 1930. Earlier insolvency is not relied upon.

The receiver claims that as the hypothecation was unlawful when made he became entitled to the assets free of lien.

After the amendment the bank had full power to do what it had undertaken to do. For three months it accepted the benefits of the agreement and allowed the assets to remain with the trustee. All parties assumed the validity of the arrangement and acted in reliance upon it. The result was the same as if the assets had been repossessed by the bank after June 25, 1930, and again hypothecated under an agreement identical with the original one.